No. 82-372

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FEDERAL TRADE COMMISSION, et al.,

Petitioners,

v.

GROLIER INCORPORATED,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether Exemption 5 of the Freedom Of Information Act (5 U.S.C. §552(b)(5)) exempts from disclosure documents prepared by an attorney which a district court has already ordered produced pursuant to a civil discovery request?

2. Whether Exemption 5 shields from disclosure documents prepared by an attorney which relate to unauthorized and unethical investigative tactics?

3. Whether Exemption 5 mandates disclosure of documents describing long-abandoned covert investigative techniques, where the action for which the documents were written has been dismissed with prejudice due to non-compliance with a discovery order requiring production of those documents, and where no related or potentially related litigation exists?

PARTIES TO THE PROCEEDING

The respondent in this proceeding is Grolier Incorporated, including all its wholly-owned subsidiaries or affiliates, such as the Americana Corporation.

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

Petitioners ask the Court to reverse the judgment of the United States Court of Appeals for the District of Columbia Circuit, which held that Exemption 5 of the Freedom Of Information Act (5 U.S.C. 552(b)(5)) does not permit the withholding of documents written by government attorneys for litigation which has been terminated, where no related or potentially related litigation exists. Instead, petitioners would have the Court construe that portion of the attorney work product rule encompassed by Exemption 5 of the Freedom Of Information Act ("FOIA") so that if a document could ever be immune from civil discovery in the case for which it was written, it must *always* fall within Exemption 5 of the FOIA, even if that prior case has terminated and no related or potentially related litigation exists.

The unique set of facts which led to respondent Grolier Incorporated's ("Grolier") FOIA request is set forth in the portion of Document "1" of the Federal Trade Commission's ("FTC") Index To Documents which was disclosed by the FTC in response to that request. Joint Appendix ("J.A.") 38-44. On February 29, 1972, the FTC filed a civil penalty action in the United States District Court of New Jersey, captioned *United States v. Americana Corporation*, Civ.No. 388-72 (D.N.J.). The FTC charged that Grolier's subsidiary, the Americana Corporation ("Americana"), violated a 1948 cease and desist order by making misrepresentations regarding its encyclopedias in its advertisements and door-to-door sales.

While that proceeding was pending, Kent C. Howerton, an attorney at the FTC's Division of Compliance of the Bureau of Consumer Protection in charge of the *Americana* litigation, in a memorandum dated April 4, 1973, "requested that the Commission's New York Regional Office conduct a supplemental investigation by having an attorney or CPS [Consumer Protection Specialist] enroll in the sales personnel training course at one of [Americana's] sales offices without identifying himself or herself as an employee of the Commission to obtain evidence concerning the sales training materials and instructions then being given to [Americana's] sales trainees." J.A. 42-43. This memorandum, containing instructions to carry out

a covert investigation through surreptitious employment of an agency investigator by respondent's subsidiary after a complaint in a civil penalty action had already been filed, is one of the alleged work product documents which petitioners have withheld.[1] The proposed supplemental investigation was conducted; an FTC investigator named Wendell Reid was hired by Americana and proceeded to spy upon its activities while pretending to be a sales trainee.

"Following a public announcement by the Commission that it was not in favor of conducting investigations utilizing undercover tape recording of meetings," Mr. Howerton telephoned Mr. Reid on June 29, 1973, and instructed him to terminate his investigation. On the same day, Mr. Howerton wrote a memorandum to the compliance file memorializing his conversation with Mr. Reid. Mr. Reid did not comply with these instructions until *five months later* when he "forwarded a memorandum dated November 13, 1973 . . . *formally closing that supplemental investigation.*" J.A. 43 (emphasis added). These memoranda appear to be Documents "5" and "3," respectively, to the FTC's Index To Documents, the second and third of the four work product documents which remain at issue.[2]

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[1] This memorandum appears to be Document "6" in the FTC's Index To Documents. That index describes the document as follows:

"Doc. #6

(5) April 4, 1973. Two pages. A Memorandum *from* Kent C. Howerton *to* Alfred W. Cortese, Jr., Assistant Executive Director for Legal Coordination. This document contains an evaluation of the existing investigation of the Americana Corporation and recommendations related to obtaining additional evidence. It was prepared in contemplation of litigation and contains evaluations, recommendations, and opinions of counsel. It is exempt from disclosure as attorney work product." (J.A. 37.)

[2] The FTC's Index to Documents describes Document "5" as follows:

"Doc. #5

(5) June 29, 1973. One page. Memorandum *to* compliance file *from* Kent Howerton, Attorney. This memorandum indicates the contents of discussions in which instructions regarding the investigation of Americana Corporation were

(Footnote continued on following page)

Americana became aware of the existence of these documents and filed discovery requests seeking them. After extensive proceedings and argument, the United States magistrate supervising discovery ordered the FTC to produce numerous documents, including the four documents presently in dispute. The FTC appealed the magistrate's order to Judge Clarkson Fisher, the district judge assigned to the *Americana* case. However, on April 7, 1976, Judge Fisher rejected that appeal and ordered the FTC to turn over the documents to Americana, affirming the magistrate's order in every respect. The FTC refused to disclose the documents, and on November 16, 1976, the district court dismissed the lawsuit with prejudice because of the agency's noncompliance with its discovery order. The FTC appealed neither Judge Fisher's discovery order nor his dismissal order.

On June 20, 1978, Grolier requested documents from the FTC pursuant to the FOIA, including, *inter alia*,

> "All records and documents which refer or relate to a covert investigation of Americana Corporation and/or Grolier Incorporated, which was made in or about April

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(Footnote continued from preceding page)

> given by Attorney Howerton. The memorandum indicates Mr. Howerton's thought processes in the preparation of the case and is exempt from disclosure as attorney work product." (J.A. 37.)

The Index to Documents describes Document "3" as follows:

> "Doc. #3
>
> (5) November 13, 1973. One page. Memorandum *from* Wendell A. Reid, Consumer Protection Specialist, New York Regional Office, *to* the Division of Compliance, Bureau of Consumer Protection. This document contains instructions of Attorney Howerton relating to procedures to be used in investigating the practices of the Americana Corporation for trial preparation. It is exempt from disclosure as attorney work product." (J.A. 36.)

The final document which Grolier continues to seek disclosure of is a memorandum to the compliance file, dated April 3, 1973, which, according to the Index To Documents, "records actions taken by attorney Howerton in relation to the investigation of Americana's practices which resulted in the filing of a civil penalty action." J.A. 37.

1973, by a Federal Trade Commission consumer protection specialist named Wendell A. Reid. . . . " (J.A. 15.)

The Commission, on July 12, 1978, denied Grolier's request in its entirety. J.A. 17-18. However, following Grolier's administrative appeal, dated August 3, 1978, the FTC agreed on October 12, 1978 to release some documents while continuing to withhold others.

On May 3, 1979, Grolier filed this lawsuit seeking disclosure of documents withheld by the FTC. By letters of September 27 and 28 and October 5, 1979, the FTC released additional documents. It then moved to dismiss the complaint, alleging that the remaining documents were exempt from disclosure.

In response to the FTC's motion, Grolier narrowed its request to seven documents. On February 21, 1980, the district court granted the FTC's motion for summary judgment with respect to three of the documents.[3] At that time, the court ordered *in camera* review of the other four documents to determine whether they contained attorney work product prepared "with an eye toward the Americana litigation." *Grolier Inc. v. FTC*, 1980-1 Trade Cas. (CCH) ¶63,188 (D.D.C. 1980). J.A. 50. The four documents viewed by the court, listed as Documents "3," "5," "6" and "7" in the Index To Documents, are the four remaining documents presently before the Court. Following *in camera* review, the district court granted petitioners' motion for summary judgment with respect to these four documents. *Grolier Inc. v. FTC*, 1980-2 Trade Cas. (CCH) ¶63,389 (D.D.C. 1980) (Appendix E to the "Petition For A Writ Of Certiorari To The United States Court Of Appeals For the District Of Columbia Circuit" (Sep. 1982)

[3] In the court of appeals, respondent also sought reversal of the district court's February 21, 1980 grant of summary judgment in favor of the FTC with respect to Documents "1" and "4." The court of appeals determined that Document "4" was exempt from disclosure under Exemption 5 as a privileged attorney-client communication, and that Document "1" was exempt because it was a part of the government's predecisional deliberative process. *Grolier Inc. v FTC*, 671 F.2d 553, 557 (D.C.Cir. 1982); Pet. App. 7a-8a. Respondent has not cross-appealed that determination.

("Pet. App."), p. 21a). The district court found the four disputed documents to be attorney work product exempt from disclosure under Exemption 5. *Id.*, pp. 22a-23a.

Grolier appealed from the grant of summary judgment with respect to six of the seven documents which the district court held were exempt from disclosure. As discussed in footnote 3 above, the court of appeals affirmed the district court's judgment with respect to Documents "1" and "4" and Grolier has not cross-petitioned for reversal of that portion of its decision.

However, a majority of the court of appeals reversed the district court's judgment with respect to Documents "3," "5," "6," and "7," holding that Exemption 5 of the FOIA does not permit the withholding of work product documents where the litigation for which those documents were created has ended and no related or potentially related litigation exists. *Grolier Inc. v. FTC*, 671 F.2d 553, 556 (D.C.Cir. 1982); Pet. App. 7a. The court of appeals then remanded the case to the district court for a determination of whether such related or potentially related litigation exists. The standard set forth by the court of appeals is not meant to apply to civil litigation generally; rather, it is restricted to the context of claims of work product privilege under Exemption 5 of the FOIA. *Id.* Moreover, that standard is not so broad as to permit disclosure merely where the litigation for which the documents were written has terminated; nor does it permit disclosure simply upon a showing that no related litigation is currently pending. *Only* where the litigation for which the work product documents were created *has terminated*, where there exists *no related litigation*, and where there is *no potential for related litigation*, must those documents be disclosed. Judge MacKinnon dissented. He endorsed the "related litigation" standard, but urged that the FOIA suit filed by Grolier itself constituted the requisite related litigation, so that, in his view, the disputed documents would fall within Exemption 5. *Id.* at 558-59; Pet. App. 11a-13a (MacKinnon, J., dissenting).

The court of appeals subsequently denied the FTC's petition for rehearing and its suggestion for rehearing *en banc*. In response to the FTC's petition, the majority filed an additional statement explaining that the its opinion addressed the work product privilege only. Pet. App. 17a-18a. It stated that

it had not addressed the deliberative process privilege, which is also encompassed within Exemption 5, because petitioners never raised that privilege with respect to Documents "3," "5," "6," and "7" in any stage of the proceedings. Neither, for that matter, did petitioners raise any other exemptions which might prevent disclosure where it would be harmful to governmental interests.

Petitioners filed a petition for certiorari on September 2, 1982, and the Court granted that petition on November 8, 1982. This case thus comes before the Court almost a decade after the documents were authored and more than six years after the litigation for which the documents were written was dismissed with prejudice.

SUMMARY OF ARGUMENT

It is important for the Court to keep in mind what this case is *not* about. This case does *not* concern the application of the work product privilege in the context of civil discovery, although much of petitioners' brief addresses that issue ("Brief for Petitioners" ("Pet. Br."), pp. 10-29 (Jan. 1983)); instead, the court of appeals limited its holding to the context of Exemption 5 of the FOIA. Moreover, this case does *not* concern the issue of whether, once a litigation terminates, attorney work product prepared for that litigation must automatically be discoverable, although much of petitioners' brief is also addressed to that issue (*id.*, pp. 14-21). Instead, the court of appeals ruled that disclosure of such work product is necessary *only* when the prior litigation is terminated and no related or potentially related litigation exists. Finally, this case does *not* involve attorney work product of the type discussed in *Hickman v. Taylor*, 329 U.S. 495 (1947), although petitioners contend that it does. Instead, this case involves attorney memoranda detailing unauthorized and unethical investigative techniques which a federal district judge has already ordered disclosed pursuant to Rule 26 of the Federal Rules of Civil Procedure. In summary, this case presents no overriding legal

issue that need govern subsequent decisions; it can be decided by the Court on very narrow grounds based on facts which are unlikely to recur in other cases.

Respondent presents four interrelated arguments.

First, it argues that because a federal district court ordered disclosure of the documents in question, those documents are "available by law to a party other than an agency in litigation with an agency" and hence do not fall within the plainly expressed scope of Exemption 5.

Second, the disputed documents reveal an FTC investigation that was conducted in violation of the agency's own internal policies and in derogation of the American Bar Association's ethical rules proscribing an attorney in litigation from contacting the opposing party without informing that party's counsel. Under sound precedent, the very nature of these documents vitiates any work product privilege and removes them from the coverage of Exemption 5.

Third, the standard adopted by the court of appeals—that Exemption 5 is inapplicable to work product documents generated in connection with litigation where such litigation is terminated and no related or potentially related litigation exists—is one which the Court should endorse. That standard best comports with the policies underlying both the FOIA and the work product rule itself. It is a standard which courts in numerous civil discovery cases have applied without any difficulty. It is also a standard which, given the other provisions of the FOIA, protects adequately both the public interest in full disclosure and the government's interest in shielding its attorneys from undue exposure.

Fourth and finally, if the Court rejects the court of appeals' standard as being overly broad, it should modify that standard to fit more precisely the facts of this case and hence establish as limited a precedent as possible. Accordingly, the Court can rule that a work product document prepared for litigation does not fall within Exemption 5 where: (a) it relates to improper, unauthorized or unethical investigatory tactics that have long been abandoned, (b) the litigation and investigation in connection with which that document was authored is terminated, (c) a federal district court has already ordered disclosure of that document in the context of civil discovery, and (d) no related or potentially related litigation exists.

ARGUMENT

I. EXEMPTION 5 IS INAPPLICABLE TO THE DOCUMENTS REQUESTED BY RESPONDENT, REGARDLESS OF WHETHER THE WORK PRODUCT RULE HAS ANY TEMPORAL LIMITATIONS.

A. Introduction.

Petitioners ask the Court to rule, as a matter of civil discovery and as a matter of interpretation under Exemption 5 of the FOIA, that the work product privilege applicable to any particular document applies in perpetuity, even after the litigation for which that document was prepared has terminated and no related or potentially related litigation exists. The Court need not reach out to decide that issue, because this case does *not* involve discovery of work product in civil litigation and because the documents in dispute *do not fall within the specific terms of Exemption 5.* The Court recently confirmed that it sits "to decide concrete cases and not abstract propositions of law" and that it will decline "to lay down a broad rule or series of rules to govern all conceivable future questions in this area [of privilege]" where unnecessary. *Upjohn Co. v. United States,* 449 U.S. 383, 386 (1981). It is unnecessary for the Court to adopt the broad rule advocated by petitioners for two reasons. *First,* the documents in question were "available by law to a party other than an agency in litigation with the agency" and hence do not fall within Exemption 5. *Second,* even assuming *arguendo* that the disputed documents are otherwise protected attorney work product, they reflect serious misconduct by governmental lawyers and any privilege is therefore vitiated.

B. The Clear Language of Exemption 5 Is Inapplicable To These Documents Because They Were Available By Law To A Party In Litigation With An Agency.

The narrow issue presented in this litigation is whether the documents in dispute fall within Exemption 5 of the FOIA (5 U.S.C. §552(b)(5)). That provision states:

"(b) This section does not apply to matters that are—

* * * * *

"(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

In *United States v. Americana Corp.*, Civ. No. 388-72 (D.N.J.), District Judge Clarkson S. Fisher ordered the FTC to produce to respondent's subsidiary all four of the documents which petitioners now ask the Court to exempt from mandatory disclosure. Regardless of whether the documents were trial preparation materials in the litigation for which they were created, they were *not* unavailable by law in that litigation, and thus, they cannot be exempt from disclosure pursuant to an FOIA request. The exemption states expressly that it is *only* applicable to documents which would not be available by law to a party other than an agency in litigation with an agency. "Reasonably construed, section (b)(5) exempts only documents that a private party in litigation with the agency could not discover." *Swisher v. Department of Air Force*, 495 F.Supp. 337, 339 (W.D.Mo. 1980), *aff'd*, 660 F.2d 369 (8th Cir. 1981). As Justice O'Connor recently wrote in *FBI v. Abramson*, 102 S.Ct. 2054 (1982), this Court "must presume that Congress chose its words with as much care as the judge himself brings to bear on the task of statutory interpretation" and it should therefore refrain from construing a statute in a fashion other than the clear language that the statute suggests. *Id.* at 2066 (O'Connor, J., dissenting, joined by Marshall, J.). Quoting Justice Frankfurter, Justice O'Connor stated:

"'A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration. He must not read in by way of creation. He must not read out except to avoid patent nonsense or internal contradiction . . . [T]he only sure safeguard against crossing the line between adjudication and legislation is an alert recognition of the necessity not to cross it and instinctive, as well as trained, reluctance to do so.'" (*Id.* at 2064, *quoting* Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Columb.L.Rev. 527, 533, 535 (1947).)

The majority opinion in *Abramson* accepted this principle of statutory construction as controlling whenever the language of a statute is "plain." *Id.* at 2061 n.7. Here, the meaning of Exemption 5 *is* plain; because Judge Fisher ordered the disputed documents to be disclosed in the *Americana* case, those documents do not fall within the exemption.

This argument was made by respondent to, but never reached by, the court of appeals. In its brief to that court, petitioners' only response was that "the fact that documents 3, 5, 6 and 7 may have been found discoverable under the ruling of the District Court in the Americana case is not a dispositive factor [because the] Supreme Court specifically barred this approach in *NLRB v. Sears, Roebuck & Co., supra*, 421 U.S. [132,] at 149 n.16 [1975]." "Brief for Appellees," p. 8 (June 5, 1981). In that cited portion of *Sears*, however, the Court simply noted that:

> "It is not sensible to construe the Act to require disclosure of any document which would be disclosed in the hypothetical litigation in which the private party's claim is the most compelling. Indeed, the House Report says that Exemption 5 was intended to permit disclosure of these inter-agency memoranda, which would 'routinely be disclosed' in private litigation . . .."

Petitioners also cited several cases which quoted, but did not reinterpret, the "routinely disclosable" language used by the Court in *Sears*.[4]

However, *none* of the cases cited by the FTC involved a determination in civil discovery that the very document sought pursuant to a subsequent FOIA request was discoverable. Rather, the "routinely disclosable" gloss upon the terms of Exemption 5 given by the Court was deemed necessary solely in order to avoid *hypothetical* claims that, in a certain type of proceeding, a disputed document *might* be discoverable. If such hypothesizing were allowed, Exemption 5 would be

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[4] The cases cited in support of petitioners' argument were: *Federal Open Market Committee v. Merrill*, 443 U.S. 340, 353 (1979), *Jordan v. United States Department of Justice*, 591 F.2d 772 (D.C.Cir. 1978) and *Exxon Corp. v. FTC*, 663 F.2d 120 (D.C.Cir. 1980).

meaningless, since *some* litigation "in which the private party's claim is the most compelling" would always be imaginable. Petitioners themselves acknowledge this reading of *Sears* in their brief. Pet. Br., p. 37. The vital distinction here, however, is that there is an actual, not a hypothetical, court order that judicially resolves the issue of discoverability in respondent's favor. The broad policy of disclosure inherent in the FOIA should thus compel disclosure of documents in the narrow circumstances presented in this case where a district court has already ruled that those documents are available as a matter of law to a private party in litigation with an agency.

C. Exemption 5 Is Inapplicable To These Documents Because They Would Be Routinely Available In Civil Discovery.

A second independent reason why Documents "3," "5," "6," and "7" are not exempt from disclosure pursuant to Exemption 5, regardless of whether the work product rule has any temporal limitations, is that such documents, which describe an unauthorized and unethical covert investigation, would be routinely available in civil discovery. Petitioners attempt to characterize these documents as trial preparation materials, the disclosure of which would reveal the thought processes and opinions of an attorney preparing a case brought by the FTC. Assuming *arguendo* the accuracy of this characterization, the documents differ from other "trial preparation" materials in one crucial respect: all four documents involve Mr. Howerton's recommendations and actions regarding the conduct of a covert investigation following the filing of a civil penalty action. Indeed, this investigation was not terminated until five months after the FTC had issued a general policy statement disapproving of the types of investigatory tactics engaged in by Wendell Reid at the behest of Mr. Howerton. Given the nature of those materials, a party in litigation with the agency would *always* be able to demonstrate the type of need which is necessary for the disclosure of such documents.

The documents would thus be "routinely disclosable," and hence are not encompassed within Exemption 5.[5]

Where the government conducts a clandestine investigation of the type involved in this case, it commits a clear violation of the ethical requirements of the Disciplinary Rule 7-104(A)(1) of the American Bar Association's Code of Professional Responsibility, which states that:

> "During the course of his representation of a client a lawyer shall not:
>
> > (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so."

Here, the government violated this rule when Mr. Howerton directed the FTC's New York Regional Office on April 4, 1973 to enroll an attorney or Consumer Protection Specialist "in the sales personnel training course at one of [Americana's] sales offices without identifying himself or herself as an employee of the Commission to obtain evidence concerning the sales training materials and instructions then being given to [Americana's] sales trainees." J.A. 42-43. The FTC thus sought to obtain evidence to bolster a complaint against Americana which had been filed over a year earlier without identifying its investigator as such, and without obtaining the consent of Americana's counsel.

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[5] In *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975), this Court stated that "it is reasonable to construe Exemption 5 to exempt those documents, and only those documents, normally privileged in the civil discovery context." The Court further noted that "the House Report says that Exemption 5 was intended to permit disclosure of those intra-agency memoranda which would 'routinely be disclosed' in private litigation, H.R.Rep.No. 1497, p. 10, and we accept this as the law." 421 U.S. at 149 n.16. Thus, if the character of the documents is such that, even though they are arguably trial preparation materials they would be routinely available in civil discovery, then they must be disclosed in response to an FOIA request.

Given this conduct, Americana contended that disclosure of the documents relating to instructions given to the FTC's investigator was mandated. This contention was set forth in the "Defendant's Memorandum in Opposition to Plaintiff's Appeal of the Magistrate's Discovery Order" (Jan. 23, 1976) in the *Americana* case:

> "On or about April 24, 1973 and while Mr. Reid was a Consumer Protection Specialist with the F.T.C., he filed a surreptitious application for employment with one of the Grolier group of companies. At this time he was interviewed by John Ezzo, a salesman charged with an improper sale in the Amended Complaint. Mr. Reid obtained certain documents from Mr. Ezzo under that subterfuge in April of 1973, some fourteen months after the commencement of the present lawsuit and without any notice to Americana Corporation or its attorneys of record. These documents are presently embodied in the contents of plaintiff's proposed trial exhibit No. 21.
>
> "Despite the fact that the present lawsuit had been instituted, a responsive pleading filed and extensive discovery was in progress, a covert interview of this sort was conducted at the behest of plaintiff. Certainly there is some question of propriety and ethics involved in this course of action, and the obvious public policy against this sort of conduct by our Government should be enforced.
>
> "Therefore, [Magistrate] Devine exercised judicial discretion and good conscience when he ordered plaintiff to produce the documents referred to in these Interrogatories. Indeed, no lesser result was mandated under these circumstances. Accordingly, defendant respectfully urges this Court to uphold that decision." (*Id.*, pp. 9-10.)

Judge Fisher agreed and affirmed the magistrate's discovery order on April 7, 1976, stating:

> "Defendants are also entitled to documents relating to the activities of Wendell A. Reid, an agent sent to work for defendant, to obtain information for the plaintiff after this suit was instituted, an answer filed, and extensive discovery in progress. Accordingly, the magistrate's discovery order was appropriate under the circumstances." ("Memorandum," p. 7 (Apr. 7, 1976).)

Respondent respectfully submits that given the nature of the documents in dispute, discovery of such documents would be routinely granted, notwithstanding the fact that they may contain attorney work product.

The district court of New Jersey is not the only court which has reached this conclusion. In *Moody v. IRS*, 654 F.2d 795 (D.C.Cir. 1981), the court of appeals remanded the case to the district court to determine whether a document claimed to be protected attorney work product must be disclosed pursuant to the FOIA because the lawyer's conduct in violation of the rules of professional responsibility vitiated the privilege. In that case, the document which plaintiff sought detailed a meeting held between an IRS lawyer and a federal district judge from which plaintiff's attorney was excluded. The court of appeals stated:

> "Appellant contends, however, that the work product doctrine does not cover Document 19 because it is the fruit of impermissible legal conduct. According to appellant, the purposeful exclusion of opposing counsel from the meeting violated the court's rules and the American Bar Association's ethical standards. Moody argues that it would be a perversion of the work product doctrine designed 'to encourage effective legal representation *within the framework of the adversary* system,' to allow it to be used to 'cover up' activities destructive of that system.
>
> "We agree that, at least in some circumstances, a lawyer's unprofessional behavior may vitiate the work product privilege. we therefore remand this case to the district court so that it may determine in the first instance whether such circumstances exist in this case, and more fundamentally, whether the actions of the IRS attorney in fact violated professional standards.
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> * * * * *
>
> "It would indeed be perverse, as appellant contends, to allow a lawyer to claim an evidentiary privilege to prevent disclosure of work product generated by those very activities the privilege was meant to prevent. Non-disclosure would then provide an incentive for, rather than against, the disfavored practices. The integrity of the adversary process is not furthered by protecting a lawyer

> who steps outside his role as 'an officer of the court . . . work[ing] for the advancement of justice while faithfully protecting the rightful interests of his clients.' An attorney should not be able to exploit the privilege for ends outside of and antithetical to the adversary system any more than a client who attempts to use the privilege to advance criminal or fraudulent ends." (*Id.* at 799-800; footnotes omitted.)

While the court in *Moody* noted that the disclosure of documents is not the only remedy for such a breach of ethics, if the violation resulted from the "exclusion of the opposing party and his counsel from a meeting[,] disclosure of what went on at that meeting . . . would therefore seem an appropriate remedy." *Id.* at 801 n. 23.[6]

Other lower courts have reached similar conclusions in FOIA cases involving bases for a claimed exemption other than the work product privilege. For instance, in *Tax Reform Research Group v. IRS*, 419 F.Supp. 415 (D.D.C. 1976), a claim under Exemption 5 based on the deliberative process privilege was denied with respect to agency memoranda detailing attempts by the IRS to harass opponents of the Nixon administration. The court found such documents not a part of the "legitimate governmental process," and hence not within the coverage of Exemption 5. Similarly, in *Kanter v. IRS*, 433 F.Supp. 812 (N.D.Ill. 1977), the court ordered disclosure of documents revealing unauthorized investigatory tactics by the agency, holding that such documents could never fall within Exemption 7 of the FOIA (5 U.S.C. §552(b)(7)). It reasoned that the FOIA did not shield materials relating to such unauthorized investigations. 433 F.Supp. at 822-23.

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[6] On remand, the district court in *Moody* declined to order disclosure, finding no ethical violation. *Moody v. IRS*, 527 F.Supp. 535, 537 D.D.C. 1981). The court of appeals reversed this determination on the ground, *inter alia*, that the unsworn statements of the attorney in question were insufficient to foreclose any determination of misconduct; it reaffirmed its view that actions in derogation of an attorney's ethical responsibilities would serve to vitiate the work product privilege. *Moody v. IRS*, 682 F.2d 266, 268 (D.C.Cir. 1982). *Accord, Martin v. Lauer*, 686 F.2d 24, 32 & n.37 (D.C.Cir. 1982).

In this case, the misconduct at issue resulted from the failure of the FTC's attorney to inform his adversary of the supplemental investigation by Mr. Reid, and to seek consent for interviews of the employees of the adversary's clients, and from that lawyer's failure to curtail an investigation clearly in violation of the agency's policies for a period of five months. Under the logic of *Moody* and *Kanter*, this factor is sufficient to vitiate the privilege being claimed by the government. The appropriate remedy in such a situation is disclosure of the memoranda written about the agency's covert investigation. Thus, given the type of documents involved in this case, disclosure in civil discovery would result as a matter of course. The documents would therefore be "routinely disclosable" and, as the Court reasoned in *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132 (1975), not exempt from mandatory disclosure under the FOIA.

II. NO HARM TO THE ADVERSARY PROCESS WILL RESULT FROM THE DISCLOSURE OF THESE DOCUMENTS.

A. The Test For Disclosure Adopted By The Court of Appeals Is Confined To The Context Of An FOIA Request.

Even if the Court were to conclude that the disputed documents would otherwise fall within Exemption 5, it should nonetheless order disclosure of these documents because the court of appeals promulgated the appropriate standard for construing that provision of the FOIA. The bulk of petitioners' brief is directed at demonstrating that harm to the government might result from the disclosure of documents in the context of civil discovery even after the litigation for which the documents were written has terminated.[7] However, the legal standard adopted by the court of appeals is restricted to determining

[7] At page 29 of their brief, petitioners acknowledge that they "have thus far addressed the application of the court of appeals' test in the civil discovery context." Pet. Br., p. 29.

whether the documents are exempt from disclosure pursuant to Exemption 5, and has no applicability to civil discovery. 671 F.2d at 556; Pet. App. 6a-7a. The court of appeals offered two reasons for so restricting its holding. *First*, unlike the case with civil discovery, when considering an FOIA request "the presumption in favor of disclosure is at its zenith." *Id.*[8] *Second*, in the context of civil discovery, the privilege is qualified and may be overcome by demonstrating need. Indeed, as the court of appeals noted, if the work product privilege were an impenetrable protection against civil discovery, the courts which extended that privilege to include documents generated in a prior terminated litigation might not have done so. *Id.* at 556 n.6, Pet. App. 5a n.6, *quoting United States v. Legget & Platt, Inc.*, 542 F.2d 655, 660 (6th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977).[9]

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[8] The Court has on numerous occasions emphasized the policy of broad disclosure embodied in the FOIA. *See, e.g., FBI v. Abramson*, 102 S.Ct. 2054, 2059 (1982) ("[t]he Freedom Of Information Act set forth a policy of broad disclosure of government documents in order 'to ensure an informed citizenry, vital to the functioning of a democratic society.'"); *Federal Open Market Committee v. Merrill*, 443 U.S. 340, 351 (1979) ("the purpose of the FOIA is 'to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.' S.Rep.No. 813, 89th Cong., 1st Sess., 3 (1965)"); *EPA v. Mink*, 410 U.S. 73, 80 (1973) ("[w]ithout question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands"); *Accord, NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 220 (1978); *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975).

[9] All three circuits which have rejected the "related litigation" test were cognizant that the documents remained discoverable upon a sufficient showing of need, and all three courts indicated that they would have been less likely to apply the work product doctrine in subsequent unrelated litigation if it were an impenetrable protection against discovery. *See In re Murphy*, 560 F.2d 326, 335 (8th Cir. 1977) ("Our conclusion that the work product privilege extends to documents prepared in previous, unrelated litigation will not make

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The *ad hoc* balancing process which exists when applying the work product rule in civil discovery does not occur here because the need of an individual litigant is not to be considered under a public disclosure statute such as the FOIA. Rather, that balancing process has been replaced in Exemption 5 by narrow categorical exceptions from the work product privilege, designed to require disclosure where the government's interest in secrecy is weakest or the public interest in disclosure is strongest. For that reason, the court of appeals' "related litigation" test is the optimal method of construing the FOIA.

1. In civil discovery the work product rule is a balancing standard, weighing the need for discovery against any detriment arising from disclosure.

In *Hickman v. Taylor*, 329 U.S. 495 (1947), the Court first announced the work product rule. However, it recognized expressly that the immunity from discovery is not absolute and may be overcome by a sufficient showing of a litigant's need for disclosure. The Court explained:

> "We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in

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attorney's files impregnable. As to ordinary work product, a litigant can secure access to these documents by establishing the relevance of the requested documents . . . and by satisfying the substantial need and undue hardship requirements. . . . "); *United States v. Leggett & Platt, Inc.*, 542 F.2d 655, 660 (6th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977) ("Were the work product rule an unpenetrable protection against discovery, we would be less willing to apply it to work produced in anticipation of other litigation. But the work product doctrine provides only a qualified protection against discovery. . . . "); *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 487 F.2d 480, 485 (4th Cir. 1973) ("Our decision will not in any way frustrate the ends of justice. If the party seeking discovery can demonstrate the substantial need and undue hardship specified in the Rule . . . the district court will order production.").

all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clue as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. And production might be justified where the witnesses are no longer available or can be reached only with difficulty. Were production of written statements and documents to be precluded under such circumstances, the liberal ideals of the deposition-discovery portions of the Federal Rules of Civil Procedure would be stripped of much of their meaning. But the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order." (*Id.* at 511-12.)

In 1970, Congress revised the Federal Rules of Civil Procedure to incorporate the work product rule set forth in *Hickman*. Federal Rule of Civil Procedure Rule 26(b)(3) sets forth the following standard for allowing discovery of trial preparation materials:

"(3) *Trial Preparation: Materials.* Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impres-

sions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

In effect, the rule adopts a balancing standard. Due to the importance to the adversary process of an attorney being able to prepare his or her case, trial preparation materials are immune from discovery, absent a showing of substantial need and inability without undue hardship to obtain equivalent materials by other means. Where, such a showing is made, the documents are discoverable. However, where disclosure of the material will reveal mental impressions and legal theories of an attorney, the court should take further steps to protect such materials or require even a higher degree of need to obtain disclosure.

2. The FOIA's narrow categories of exemption contrasted with civil discovery.

In *EPA v. Mink*, 410 U.S. 73 (1973), the Court explained that the FOIA is a revision of Section 3 of the Administrative Procedure Act (5 U.S.C former §1002), which was designed to replace "vague phrases, such as that exempting from disclosure 'any function of the United States requiring secrecy in the public interest,'" with "nine exemptions from compelled disclosures . . . intended to set up concrete, workable standards for determining whether particular material may be withheld or must be disclosed." 410 U.S. at 79. The Court futher stated that the exemptions contained in subsection (b) of the FOIA were designed to perform, on a categorical basis, the balancing of the public's need for disclosure against the government's need for secrecy:

> "Subsection (b) is part of this scheme and represents the congressional determination of the types of information that the Executive Branch must have the option to keep confidential, if it so chooses. As the Senate Committee explained, it was not 'an easy task to balance the opposing interests, but it is not an impossible one either . . .. Success lies in providing a workable formula which encompasses, balances and protects all interests, yet places emphasis on the fullest responsible disclosure.' S.Rep.No. 813, p. 3." (410 U.S. at 80.)

The Court in *Mink* recognized that "the discovery rules can only be applied under Exemption 5 by way of rough analogies." *Id.* at 86. The Court has also indicated that Exemption 5 was not intended to incorporate "every privilege known to civil discovery." *Federal Open Market Committee v. Merrill*, 443 U.S. 340, 354 (1979). In that case, the Court explained that in the context of civil discovery, a qualified privilege exists for trade secrets and other confidential commercial information, under which "the courts have not given trade secrets automatic and complete immunity against disclosure, but have in each case weighed their claim for privacy against the need for disclosure." *Id.* at 362. Despite the fact that one does not consider the requester's special need for disclosure under the FOIA (*see EPA v. Mink, supra*, 410 U.S. at 86), the Court held in *Merrill* that the qualified nature of the privilege required that it not be applied in every case where a trade secret claim might be upheld in civil discovery. Rather, only where the government would be significantly harmed by disclosure could it delay disclosure pursuant to Exemption 5. *Id.* at 362-63.

With respect to the work product rule under Exemption 5, the Court has likewise applied the rule to prevent disclosure only where a significant harm to governmental interests would be prevented thereby. Where, on the other hand, no such harm would occur to the government, or where the public interest in disclosure is especially great, Congress and the courts have carved out exceptions to the work product rule's application under Exemption 5 of the FOIA that are not applied in civil discovery.

The most prominent exception from the work product rule, as incorporated by Exemption 5, is that factual material must be disclosed, despite the fact that it receives a qualified protection from civil discovery under Fed.R.Civ.P. 26(b)(3). In *EPA v. Mink, supra*, 410 U.S. at 89, the Court stated that "[v]irtually all of the courts that have thus far applied exemption 5 have recognized that it requires different treatment for materials reflecting deliberative or policy-making processes on the one hand, and purely factual, investigative matters on the other." As one district court has phrased it, "the portion of the attorney work product rule subsumed into Exemption 5 is

that portion which protects from discovery mental impressions, conclusions or legal theories of a Government attorney, the deliberations of counsel but not factual and tangible matter." Fonda v. CIA, 434 F.Supp. 498, 505 (D.D.C. 1977). *See* Toran, *Information Disclosure in Civil Actions: The Freedom of Information Act and the Federal Discovery Rules*, 49 Geo.Wash.L.Rev. 843, 862 (1981) (civil discovery privileges broader than analogous privileges incorporated in FOIA's exemptions).

The differing treatment of factual attorney work product material is not the only distinction between the work product privilege under Rule 26(b) and Exemption 5. Other courts have held that attorney work product documents lose the protection afforded by Exemption 5 when the documents are incorporated by reference in a final agency opinion; yet no such analogous principle exists in the context of civil discovery. *See Bristol-Myers Co. v. FTC*, 598 F.2d 18, 29 (D.C.Cir. 1978).

Consequently, where the governmental interest in secrecy is negligible, the Court should carve out a limited exception to that portion of the work product rule encompassed within Exemption 5, even if it would not be willing to carve out such an exception in the context of civil discovery.

B. The "Related Litigation" Test Best Balances The Competing Policies Of The FOIA And The Work Product Rule.

1. Once litigation has ended and no prospect for related litigation exists, the policies underlying the work product rule no longer apply.

a. The policy underlying the work product doctrine as expressed in Rule 26 and this Court's decisions.

The heightened standard of need required for disclosure of documents by the work product rule, which is embodied in Rule 26(b)(3), applies to trial preparation materials prepared in anticipation of litigation. Congress sought to prevent harm to the trial process, which might result from an attorney's knowledge that his or her written work product in preparation

for litigation could be discovered freely by an adversary and used against the attorney in that litigation. As the Advisory Committee's Note to the 1970 Amendments to Rule 26(b)(3) states:

> "[T]he requirement of a special showing for discovery of trial preparation materials reflects the view that each side's informal evaluation of its case should be protected, that each side should be encouraged to prepare independently, *and that one side should not automatically have the benefit of the detailed preparatory work of the other side.*" (Advisory Committee's Explanatory Statement Concerning Amendments of the Discovery Rules, 48 F.R.D. 487, 501 (1970); emphasis added.)

The concern about damage to the adversary process stemming from an attorney's knowledge that his trial preparation materials might be prematurely disclosed to his opponent has been repeated on numerous occasions by the Court. In the seminal opinion of *Hickman v. Taylor*, 329 U.S. 495 (1947), both the opinion of the Court and Justice Jackson's concurring opinion emphasized the work product rule's purpose of preventing harm to the adversary process. The Court stated that the rule is necessary for the "[p]roper preparation of a client's case," *(id.* at 511) and to advance *"the public policy underlying the orderly prosecution and defense of legal claims" (id.* at 510; emphasis added). As a result, only documents prepared "with an eye toward litigation" are subject to protection under the work product rule.[10]

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[10] As the district court in *Gulf Construction Co. v. St. Joe Paper Co.*, 24 F.R.D. 411, 415 (S.D.Tex. 1959) observed: "Hickman v. Taylor involved the discovery and production of statements of witnesses acquired by counsel in anticipation of the litigation then before the court." However, where the requested documents were not prepared in anticipation of the case at bar, but rather concerned a claim which could constitute a separate lawsuit, the documents do "not constitute the work product of the lawyer, produced in preparation of a client's case and so intimately concerned with the functioning of the lawyer that their production would have a demoralizing effect on the legal profession." *Id.*

Similarly, Justice Jackson, in his concurring opinion, observed that the harm sought to be curtailed by the work product doctrine is the destruction of the adversary process which would occur from the disclosure of the attorney's trial preparation materials in advance of trial: "[d]iscovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary." *Id.* at 516 (Jackson, J., concurring).[11] This emphasis on harm to the adversary process through premature disclosure as the basis for any work product privilege was reaffirmed by the Court in *United States v. Nobles*, 422 U.S. 225, 236 (1975) and *Upjohn Co. v. United States*, 449 U.S. 383, 398 (1981), both of which reiterate the language of *Hickman*.[12]

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[11] The lower courts are divided on the issue of whether documents revealing mental impressions and trial strategies are absolutely immune from discovery in the case for which they were written, or may be disclosed upon a compelling showing of need by the party seeking discovery. *Compare In re Grand Jury Investigation*, 599 F.2d 1224, 1231 (3d Cir. 1979); *In re Natta*, 410 F.2d 187, 192-93 (3d Cir.), *cert. denied*, 396 U.S. 836 (1969); *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 90 F.R.D. 45, 47 (N.D.Ill. 1981); *In re Special September 1978 Grand Jury II*, 640 F.2d 49, 63 (7th Cir. 1980) (holding that such documents receive only a qualified immunity and may be overcome by a sufficient showing of need) *with Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 733-35 (4th Cir.), *cert. denied*, 420 U.S. 997 (1975) (holding that such documents may never be disclosed). The Court has declined to reach the issue, indicating that whether or not such documents are absolutely immune, they are, at a minimum, subject to special protection and may not be disclosed merely under the "substantial need" and "undue hardship" standard. *Upjohn Co. v. United States*, 449 U.S. 383, 401-02 (1981).

[12] Petitioners mislead the Court when they state that the *Sears* decision supports implicitly the view that the work product privilege is perpetual in nature. Pet. Br., p. 15 n.6. Petitioners assert that many of the documents sought by Sears related to closed files, but that the Court drew no distinction therefrom in applying the privilege. In fact, however, the General Counsel of the NLRB told Sears that he would "make available . . . all Advice and Appeals Memoranda in cases which had been closed—either because litigation before the Board had been completed or because a decision not to file a complaint had

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Accordingly, as the court of appeals recognized:

"The purpose of the privilege, as this court has made clear, 'is to encourage effective legal representation *within the framework of the adversary system* by removing counsel's fears that his thoughts and information will be invaded by his adversary. In other words, the privilege focuses on the integrity of the adversary trial process itself * * *.' *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 775 (D.C.Cir. 1978) *(en banc)* (emphasis in original; footnote omitted). Therefore, in order to fall within the scope of the privilege a document '*must* " relate to the conduct of either ongoing or prospective trials; [it must] include factual information, mental impressions, conclusions, opinions, legal theories or legal strategies relevant to any ongoing or prospective trial." ' *Exxon Corp. v. FTC*, 663 F.2d 120, 129 (D.C.Cir. 1980) (emphasis added; brackets in original) *(quoting Jordan v. U.S. Dep't of Justice, supra*, 591 F.2d at 775-776)." *(Grolier Inc. v. FTC, supra*, 671 F.2d at 556; Pet. App. 6a.)[13]

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become final." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 145 (1975). In ruling on Exemption 5 claims, the Court ordered disclosure of all Advice and Appeals Memoranda recommending dismissal of a charge, but held that such memoranda that direct the filing of a complaint are protected by the work product privilege. *Id.* at 158-60. Yet if petitioners are right here, then the Court in *Sears* should have held that to the extent memoranda recommending dismissals contain attorney work product, they are exempt forever pursuant to Exemption 5; that the Court did not do so means that *Sears* supports implicitly the position of the court of appeals below, not that of petitioners.

[13] Petitioners argue that the language from *Jordan* contained in this quotation was taken out of context and merely "meant that a document cannot be work product unless, when made or compiled, it related to 'ongoing or prospective trials.' " Pet. Br., pp. 34-35 n.12. In fact, however, the language is, at most, ambiguous; the court in *Jordan* may have meant that the documents were not protected because they were not initially prepared in anticipation of specific litigation, or because at the time of the FOIA request in that case, no ongoing or prospective litigation existed. Given the principle that privileges from discovery should be narrowly construed, so as not to obstruct the search for the truth, and the fact that exact language used

Thus, the fundamental concern underlying the work product privilege is with the trial process itself. Harm to the adversary system must be measured against the need of a litigant for disclosure of documents.

In this case, however, as the court of appeals noted, once the litigation for which the documents were written has been completed, and no related or potentially related litigation exists, the possiblity of damage to the adversary system is foreclosed because the purpose of the work product doctrine has already been achieved. *Grolier Inc. v. FTC, supra*, 671 F.2d at 556, Pet. App. 7a, *quoting In re Grand Jury Proceedings*, 73 F.R.D. 647, 653 (M.D.Fla. 1977).

Once litigation has terminated, an attorney need not fear that his opponent will gain an unfair advantage by discovering his strategies and trial preparation materials. Furthermore, the vague possibility of future disclosure would not discourage adequate preparation because the immediate need to prepare for trial would greatly outweigh any disadvantage to be incurred through eventual disclosure.

b. The policy underlying the work product rule does not support petitioners' proposed test.

In the prior subsection, respondent has shown that the courts and the drafters of the Federal Rules all state the view that the work product privilege applies to anticipated or ongoing litigation. This point is also supported by a consideration of the policies underlying that privilege which have been identified by commentators.

(Footnote continued from preceding page)

by the court in *Jordan* that "public disclosure . . . could have no conceivable effect on the actual conduct of an on-going or prospective trial" (591 F.2d at 775), the court of appeals here was certainly reasonable in citing this language as support for its "related litigation" standard and is in the best position to construe the meaning of its own prior decision.

One noted scholar, Professor Edward Cooper,[14] has explained that one "justification for the work-product protection which might be found within the terms suggested by the Court is that it is somehow unfair for one party to reap the harvest of preparatory seeds sown by his opponent. Such a notion might be based upon an aversion to allowing the lazy and slothful to profit from the diligence of others, or in a vested-rights idea that 'a lawyer is entitled to the fruits of his labor.'" Cooper, *Work Product of the Rulemakers*, 53 Minn.L.Rev. 1269, 1276 (1969).[15] It is clear that this justification has no application under the "related litigation" test because after the prior case is over and there is no prospect of related or potentially related litigation, it is too late for the lazy or unprepared attorney to profit from his opponent's work.

Professor Cooper noted further that, while it is unclear what the Court in *Hickman* meant by its "vague allusion to 'sharp practices'" by attorneys which might develop from unlimited discovery, commentators have suggested "that lawyers would simply lie about information uncovered by their own investigations, insert false statements or misleading memoranda in their files, or that their ingenuity might in some other way 'prove equal to the situation.'" *Id.* at 1278. While it is doubtful that, even if unlimited discovery existed, lawyers would resort to such practices, it is inconceivable that a lawyer would bother making such efforts if he or she knew that disclosure could only result when the litigation is over and no related or potentially related litigation exists.

As for the argument that disclosure would deter adequate investigation or preparation of written materials adverse to

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[14] The court of appeals cited Professor Cooper's commentary as direct support for the "related litigation" test. 671 F.2d at 555; Pet. App. 5a. Petitioners' assertion that his conclusion appears in a footnote and is "without any supporting analysis" (Pet. Br., p. 32 n.11) ignores Professor Cooper's lengthy analysis of the purpose of the work product protections.

[15] The same justifications for the work product rule discussed in Professor Cooper's commentary have been advanced by other commentators. *See, e.g.*, Note, *Discovery of An Attorney's Work Product In Subsequent Litigation*, 1974 Duke L.J. 799, 820.

one's client, Professor Cooper observed that the need for written records will outweigh a lawyer's fear of eventual disclosure. *Id.* at 1277-81.[16] This should hold particularly true for government attorneys. As petitioners note ("Petition for Certiorari," p. 13 (Sept. 1982)), the very size of the government and the transience of the attorneys employed by it dictate the need for comprehensive written files. Yet, precisely because of all of these pressures, it is far more likely that government attorneys will continue to put their preparation materials in writing rather than be deterred from doing so by the slight risk that their written materials may eventually be made public at a time when it would no longer be beneficial to their adversaries.

c. Rebuttal to petitioners' counterarguments.

Realizing the weaknesses inherent in their policy arguments when applied to the test adopted by the court of appeals, petitioners set up several "straw man" arguments. Each such argmuent was rejected by the court of appeals and requires little discussion.

First, petitioners contend that all of the courts of appeals which have reached the question of whether the work product privilege extends to subsequent litigation in the civil discovery context have answered it in the affirmative. Pet. Br., p. 7. As discussed previously, however, significant differences exist between considerations in the context of civil discovery and those

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[16] Professor Cooper stated:

> "There is good reason to doubt whether in fact many lawyers would dare to curtail trial preparation activities for the reasons thus suggested. . . . Professor James has answered this explanation with the three-barreled response that: 'no party can afford to forego the kind of preparation he believes is needed'; each party 'must know the facts as they are likely to appear at trial,' and be able to evaluate the case realistically for settlement purposes; and no party 'will be willing to let his adversary get to the witnesses first if this can be helped.'" Cooper, *supra*, 53 Minn.L.Rev. at 1280, *quoting* F. James, *Civil Procedure* 206 (1965).)

See also LaFrance, *Work-Product Discovery: A Critique*, 68 Dick.L. Rev. 351, 367-68 (1964).

under the FOIA. In civil discovery, a court always performs a balancing task and may order disclosure even if the documents fall within the work product privilege. Indeed, as indicated in footnote 9 above, all three circuits which have reached this question explicitly stated that, were the work product rule an "unpenetrable protection against discovery," they would have been less inclined to extend the privilege to subsequent unrelated litigation. The court of appeals in this case also noted that this is a basis for distinguishing Exemption 5 from Rule 26(b)(3). 671 F.2d at 556 & n.6; Pet. App. 4a-5a & n.6. The FOIA, on the other hand, replaces the case-by-case balancing standard existing in civil discovery with categorical exceptions from the privilege designed to perform this balancing task on a more general basis.

Petitioners further attempt to create an impression that there are no cases which support a "related litigation" standard, or that those cases which do support the standard are poorly reasoned and rely uncritically on past decisions. These assertions are simply false.

In *Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551, 557 (2d Cir. 1967), the Second Circuit distinguished two lower court opinions which held that the work product privilege is applicable only in the litigation for which the work was prepared. The court of appeals reasoned that in those cases, the "prior proceedings had been fully completed before discovery was requested," whereas in *Republic*, the attorney's former clients remained suable. As a result, the purpose of the work product rule—to remove the fear that the attorney's thoughts would be invaded by his adversary and used against him—would be defeated. This method of distinguishing the prior cases supports implicitly the principle that, when the litigation is over and there is no related or potentially related litigation, the privilege does not apply. Indeed, cases which have relied on *Republic* have cited it explicitly for this proposition. *See, e.g., Hercules, Inc. v. Exxon Corp.*, 434 F.Supp. 136, 153 (D.Del. 1977); *Commonwealth Of Puerto Rico v. S.S. Zoe Colocotroni*, 61 F.R.D. 653, 658 (D.P.R. 1974); *Midland Investment Co. v. Van Alstyne, Noel & Co.*, 59 F.R.D. 134, 138 (S.D.N.Y. 1973); *Honeywell, Inc. v. Piper Aircraft Corp.*, 50

F.R.D. 117, 119 (M.D.Pa. 1970); *Philadelphia Elec. Co. v. Anaconda American Brass Co.*, 275 F.Supp. 146, 148 (E.D.Pa. 1967); *A. v. District Court of Second Judicial District*, 550 P.2d 315, 328 (Colo. 1976); *Riggs Nat'l Bank of Wash., D.C. v. Zimmer*, 355 A.2d 709, 716 (Del.Ch. 1976).[17]

Furthermore, as noted by the court of appeals (671 F.2d at 555; Pet. App. 4a), many of the legal commentators who have considered the issue have supported an existing or potential related litigation standard similar to that adopted by it. For example:

> "Ordinarily the work-product privilege will have served its purpose when the particular litigation for which material was gathered has terminated, either by the entry of judgment or by the running of the statute of limitations. But so long as a likelihood of litigation remains, it seems that the protection should continue, even if it is afforded to one not a party to the suit in which discovery is sought." (Note, *Developments In The Law—Discovery*, 74 Harv.L.Rev. 940, 1038 (1961); footnotes omitted.)

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[17] There are also numerous cases which would go even further and confine the work product privilege to the litigation for which the documents were created, regardless of whether any related or potentially related litigation exists. *See, e.g., Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co.*, 68 F.R.D. 397, 402 (E.D.Va. 1975); *United States v. IBM Corp.*, 71 F.R.D. 376, 379 (S.D.N.Y. 1976); *United States v. IBM Corp.*, 66 F.R.D. 154, 178 (S.D.N.Y. 1974); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 207 F.Supp. 407, 410 (M.D.Pa. 1962); *Gulf Construction Co. v. St. Joe Paper Co.*, 24 F.R.D. 411, 415 (S.D.Tex. 1959); *Tobacco & Allied Stocks v. Transamerica Corp.*, 16 F.R.D. 534, 537 (D.Del. 1954).

In an analogous setting, it should further be noted that the courts have refused to find appraisers' reports privileged from discovery under the FOIA where the transaction to which those reports related has been completed. *E.g., Tennessean Newspapers, Inc. v. FHA*, 464 F.2d 657, 660 (6th Cir. 1972), *aff'g* 341 F.Supp. 1013, 1015 (M.D.Tenn. 1971); *GSA v. Benson*, 415 F.2d 878, 880 (9th Cir. 1969); *Philadelphia Newspapers, Inc. v. HUD*, 343 F.Supp. 1176, 1178 (E.D.Pa. 1972).

Similarly, Professor Cooper observed:

> "Several cases suggest that the protection applies only if the materials were prepared in anticipation of the very suit before the court . . . and vanishes when that litigation is terminated. . . . It should be clear that this conclusion is tenable only when there is no danger of disclosure to others pursuing claims related to the claims involved in the litigation giving rise to the one-time work product materials." (Cooper, *supra*, 59 Minn.L.Rev. at 1299 n.100.)

Petitioners contend that "the policy underlying the work-product doctrine would be seriously eroded if the privilege immediately evaporated upon the termination of the litigation in connection with which it was prepared." Pet. Br., p. 18. That test, however, is not the one adopted by the court of appeals. Moreover, petitioners' hypothetical example of a complaint which "had been dismissed on grounds that did not bar reinstitution of suit" (*id.*, p. 19) is fundamentally different from the facts of this case, where the *Americana* civil penalty action was dismissed with prejudice. Petitioners' assertion that attorneys will fail to prepare written materials because of a remote possibility of disclosure in subsequent related litigation (Pet. Br., pp. 18-19), again ignores the fact that the standard adopted by the court of appeals precludes such disclosure.[18]

Petitioners then proffer their second "straw man," arguing that the "related litigation" standard will not solve the foregoing problems because of the uncertainties in defining related litigation. Pet. Br., pp. 21-24. Yet, uncertainty as to whether a document will be protected by the work product privilege is inherent in the privilege itself, since whether a document is protected in the context of civil discovery is determined by a balancing process. Whether the litigation in which disclosure is sought is related to the litigation for which the documents were

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[18] Indeed, contrary to petitioners' representations, all three of the judges on the court of appeals adopted a related litigation test. Judge MacKinnon simply thought that an FOIA suit by one who had been a party to the previous litigation constituted the requisite related litigation. 671 F.2d at 558-59; Pet. App. 11a-13a (MacKinnon, J., dissenting).

created, and how closely related are those two cases, are simply additional factors to be considered in determining whether documents should be disclosed. Moreover, the "related litigation" standard has been applied by numerous cases in the work product context with little difficulty, and has been embodied in other statutes adopted by Congress. *See infra*, at pp. 33-35.

Finally, petitioners list a series of harms which conceivably could occur, no matter what context the disclosure occurred. Pet. Br., pp. 18-20, 24-25. It should be noted that since the court of appeals confined its ruling to the FOIA, the only context in which such harms should be considered is that of disclosure pursuant to the FOIA. However, even if the test adopted by the court of appeals were applied in the civil discovery context, a party would not be able to burden his adversary with irrelevant, vexatious and expensive discovery requests. As the Court explained in *Herbert v. Lando*, 441 U.S. 153 (1979):

> "[T]he discovery provisions, like all of the Federal Rules of Civil Procedure are subject to the injunction of Rule 1 that they 'be construed to secure the just, *speedy*, and *inexpensive* determination of every action.' (Emphasis added.) To this end, the requirement of Rule 26(b)(1) that the material sought in discovery be 'relevant' should be firmly applied, and the district courts should not neglect their power to restrict discovery where 'justice requires [protection for] a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . .' Rule 26(c). With this authority at hand, judges should not hesitate to exercise appropriate control over the discovery process." (441 U.S. at 177.)

Thus, in the context of civil discovery, the Federal Rules protect against the prospect of burdensome document requests from prior cases, or from disclosure of documents which might embarass the attorney in front of his former client.

While the FOIA has no requirement that the documents be relevant (since every member of the public has an equal right of access to government documents), other protections from requests which are oppressive, expensive, or otherwise harm

government interests have been specifically enumerated in the Act and its exemptions. *First*, unduly burdensome requests will be discouraged by the provisions allowing the agency to charge reasonable search and copying costs. 5 U.S.C. §552(a)(4)(A). *Second*, other exemptions exist under the FOIA to prevent disclosure where it would be harmful. *See infra*, at p. 35.[19]

2. The test adopted by the court of appeals is workable and will give adequate protection to government attorneys.

a. The test is workable.

Petitioners contend that the "related litigation" standard adopted by the court of appeals is nebulous and inherently

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[19] Another factor weighing in favor of disclosure here is that the documents in question relate to investigative techniques that have long since been abandoned. 671 F.2d at 557; Pet. App. 7a. Yet in the context of civil or criminal discovery, courts have often permitted disclosure of documents relating to terminated governmental investigations because of the very remoteness in time of such documents. *See Swanner v. United States*, 406 F.2d 716, 719 (5th Cir. 1969); *Wood v. Brier*, 54 F.R.D. 7, 11-12 (E.D.Wis. 1972); *Capitol Vending Co. v. Baker*, 35 F.R.D. 510, 511 (D.D.C. 1964). Similarly, in 1974, Congress amended Exemption 7(A) of the FOIA so that investigatory records cannot be withheld after the investigation and enforcement proceedings had concluded. *See* H.R.Rep. No. 93-1380, 93d Cong., 2d Sess. 12 (1974); 120 Cong.Rec. 17033-34 (May 30, 1974). The Court itself acknowledged the intent of Congress in so amending Exemption 7 in *NLRB v. Robbins Tire & Rubber Corp.*, 437 U.S. 214, 227-32 (1978), and since *Robbins*, courts have repeatedly held that where investigation and enforcement proceedings have been completed, a document relating thereto is not protected under Exemption 7(A). *E.g., Pacific Molasses Co. v. NLRB*, 577 F.2d 1172, 1184 (5th Cir. 1978); *Nemacolin Mines Co. v. NLRB*, 467 F.Supp. 521, 524 (W.D.Pa. 1979); *Associated Dry Goods Corp. v. NLRB*, 455 F.Supp. 802, 812-13 (S.D.N.Y. 1978). By citing Exemption 5 as the basis for withholding the documents involved in this case concerning Mr. Howerton's instructions on conducting an investigation, petitioners attempt to avoid having to prove that disclosure will either "interfere with enforcement proceedings" (5 U.S.C. 552(b)(7)(A)), or "disclose investigative techniques and procedures." (5 U.S.C. 552(b)(7)(E). This is clearly contrary to the express intent of Congress in amending Exemption 7.

unworkable. That assertion is nonsense. The cases that have utilized the test in the context of civil discovery have had little difficulty in applying it. Those cases have looked to a variety of factors in determining whether two cases are related, including: (1) whether the same parties are aligned in the same way in the two cases; (2) whether the same counsel represented the parties in the two cases; (3) whether the two cases were of the same nature, *i.e.*, both criminal or both civil; and (4) whether the issues being contested in the first case were identical or substantially the same as the issues being contested in the second case. *See, e.g., Hercules, Inc. v. Exxon Corp.*, 434 F.Supp. 136, 153 (D.Del. 1977); *Commonwealth of Puerto Rico v. S. S. Zoe Colocotroni*, 61 F.R.D. 653, 658 (D.P.R. 1974); *Honeywell, Inc. v. Piper Aircraft Corp.*, 50 F.R.D. 117, 119 (M.D.Pa. 1970); *A. v. District Court of Second Judicial District*, 550 P.2d 315, 328 (Colo. 1976). Thus, petitioners' catalogue of projected difficulties in applying a "related litigation" standard has little basis in fact.

Moreover, the "related litigation" test has its analogues in other statutes as well. A prime example is Section 5(c) of the Administrative Procedure Act (5 U.S.C. §554(d)), which prohibits agency employees involved in the investigation or prosecution of one case from serving as decision makers in the same or a "factually related" case. The Attorney General has construed the term "factually related" case to refer to "a situation in which a party is faced with two different proceedings arising out of the same set of facts." Attorney General's Manual on the Administrative Procedure Act, 54 n.6 (1947). In a series of decisions, the FTC has had little difficulty in applying this standard and finding no factual relatedness between two cases. *E.g., Borg-Warner Corp.*, 3 CCH Trade Reg. Rep. ¶21,924 at 22,309-10 (FTC 1982); *Kroger Co.*, 98 F.T.C. 639, 751-52 (1981); *Grolier Inc.*, 98 F.T.C. 115, 123-24 (1981); *Columbia Broadcasting Sys., Inc.*, 67 F.T.C. 1369, 1370-71 (1965), *aff'd*, 414 F.2d 974, 982 (7th Cir. 1969), *cert. denied*, 397 U.S. 907 (1970). *See Cisternas-Estay v. INS*, 531 F.2d 155, 161 n.4 (3d Cir. 1976) (Gibbons, J., dissenting) (suggesting the term could encompass cases having "a common nucleus of operative facts," as that phrase was used by the Court in *United Mine Workers v. Gibbs*, 383 U.S. 715, 725

(1966)). Thus, the practical difficulties perceived by petitioners in applying a "related litigation" test are more illusory than real.[20]

b. The test adequately protects government attorneys.

The "related litigation" test also adequately protects government attorneys. As shown above at pages 26-28, many of petitioners' concerns about the "chilling effect" of this test are simply ill-founded. The test adopted by the court of appeals is very narrow: it applies *only* in FOIA suits and mandates disclosure *only* when the prior litigation in question is definitely terminated *and* no related or potentially related litigation exists.

Moreover, it must be kept in mind that the FOIA contains numerous designated exemptions; any item of attorney work product might also fall within, for example, the deliberative process privilege of Exemption 5 or Exemption 7's protection of investigational records.[21] On a motion for rehearing, the court of appeals was careful to note that petitioners had never raised any of these other privileges as to the remaining documents in dispute and hence it never addressed them. Pet. App. 17a-18a. The Court should not allow petitioners to profit from their deliberate tactical decision to claim only one privilege; it should "hesitate to construe Exemption 5 to incorporate a civil discovery privilege that would substantially duplicate another exemption." *Federal Open Market Committee v. Merrill*, 443 U.S. 340, 355 (1979).

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[20] However, the term "related litigation" should *not* encompass an FOIA action filed to seek disclosure of documents prepared in a prior suit. To rule otherwise would produce what the court of appeals rightly viewed as a "strange" result, because the mere filing of an FOIA action would then, in and of itself, be sufficient to trigger the applicability of an exemption to the FOIA. 671 F.2d at 557; Pet. App. 8a.

[21] This point disposes of petitioners' contention based on the *Leggett & Platt* case (Pet. Br., pp. 27-28) that a party obtaining disclosure of work product prepared for a terminated government case might obtain "valuable information" about governmental "investigative strategies." Under the FOIA, such documents would fall within Exemption 7 if their disclosure would interfere with enforcement proceedings or reveal investigative techniques. *See* footnote 19, *supra*.

C. On The Facts Of This Case, This Court Could Fashion An Even Narrower Exception To The Work Product Rule Under Exemption 5 Than That Adopted By The Court Of Appeals.

If the Court determines that the standard adopted by the court of appeals does not adequately protect the government's interests, the facts of the case permit the Court to carve out an even narrower exception to the work product privilege embodied in Exemption 5. The Court could create an exception limited to situations in which the requested documents describe improper, unauthorized or unethical investigatory conduct in the handling of government investigations and were ordered disclosed by a federal district court. Or the Court could narrow that standard further by combining it with the elements of the "related litigation" test adopted by the court of appeals. For example, the Court could order disclosure only where such records relate to: (1) improper, unauthorized or unethical investigatory tactics that have since been abandoned by the agency, (2) where the litigation and investigation for which the documents were written has been terminated, (3) where a district court has ordered, in the context of civil discovery, that the documents be disclosed, and (4) where no related or potentially related litigation exists. Given the character of the documents involved in this case, and the history of this litigation, it is clear that such a categorical exception from the work product privilege encompassed within Exemption 5 is warranted.

Such a categorical exception is consistent with the Court's recent statement in *FBI v. Abramson*, 102 S.Ct. 2054, 2064 (1982), that:

> "We are not persuaded that Congress's undeniable concern with possible misuse of governmental information for partisan political activity is the equivalent of a mandate to release any information which might document such activity. . . . [T]he Act required assessment of the harm produced by disclosure of certain types of information. Once it is established that information was compiled pursuant to a legitimate law enforcement investigation and

> that disclosure of such information would lead to one of the listed harms, the information is exempt. Congress thus created a scheme of categorical exclusion; it did not invite a judicial weighing of the benefits and evils of disclosure on a case-by-case basis."

The interpretation of the coverage of Exemption 5 proposed here would not require a balancing of need on a case-by-case basis, but would rather create a narrow categorical exception to the work product rule, much like the crime-fraud exception, which has been recognized by numerous courts in the civil discovery context.[22]

Such a narrow exception would also be consistent with the common law limits on claims of privilege and the concepts of exception and implied waiver which have been created to avoid the application of a privilege where it would be inconsistent with the adversary process. As the court of appeals explained in *In re Sealed Cases*, 676 F.2d 793 (D.C.Cir. 1982):

> "Nevertheless, even though privileges usually provide categorical protection, two common law doctrines give courts a limited ability to make sure that privileges do not serve ends for which they were not intended. These doctrines are *exception* and *implied waiver*. Exception

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[22] Recent cases holding that documents containing evidence of crime or fraud fall within an exception to the work product rule include *In re Sealed Cases*, 676 F.2d 793 D.C.Cir. 1982); *In re Grand Jury Proceedings*, 674 F.2d 309 (4th Cir. 1982); *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798 (3d Cir. 1979). While this exception is usually applied where the work product of the lawyer is used to further or cover up a crime or fraud perpetuated by a client, several courts have noted that it is also applicable to the wrongdoing of the lawyer. *See, e.g., In re Sealed Cases, supra*, 676 F.2d at 815 ("The *prima facie* violation may also be the attorney's, since attorney misconduct negates the premise that the adversary system furthers the cause of justice"). Moreover, in *In re Murphy*, 560 F.2d 326 (8th Cir. 1977), one of leading cases for the proposition that the work product privilege continues after the litigation for which the work was created has terminated, the court recognized a crime or fraud exception to work product where the documents "bear a close relationship to the clients' existing or future scheme to commit a crime or fraud." *Id.* at 336 n. 19.

> comes into play when a privileged relationship is used to further a crime, fraud, or other fundamental misconduct. The leading case on exception, . . . expresses the doctrine's basic principle: 'A privilege surviv[es] until the relation is abused and vanish[es] when abuse is shown to the satisfaction of the judge . . . .' Implied waiver deals with an abuse of a privilege itself rather than of a privileged relationship. Where society has subordinated its interest in the search for truth in favor of allowing certain information to remain confidential, it need not allow that confidentiality to be used as a tool for manipulation of the truth-seeking process." (*Id.* at 807.)

The proposed exception to the work product rule encompassed by Exemption 5 is clearly analogous to these principles of exception and implied waiver recognized in the context of civil discovery.

CONCLUSION

In summary, given that the issue of the disclosability of these documents arises in the context of the FOIA, the Court should rule that they do not fall within the ambit of that portion of the work product rule encompassed by Exemption 5. The key purpose underlying the enactment of the FOIA was free disclosure of governmental records; as Professor Kenneth Culp Davis has said:

> "The *entire* push of the Information Act is to require disclosure, except that subsection (b) states the nine exemptions to which the Act 'does not apply.' The Act is clear on its face. It has no provision that can be interpreted as a prohibition on disclosure. It contains no ambiguity and no uncertainty on that subject." (1 K. Davis, *Administrative Law Treatise* §5:8, p. 329 (2d ed. 1978); emphasis in original.)

Consequently, the exemptions incorporated in subsection (b) of the FOIA were meant to be applied by the courts in the narrowest possible way:

> "The Senate committee said: 'The purpose of this subsection is to make it clear beyond doubt that all materials of the Government are to be made available to the public by publication or otherwise unless explicitly

allowed to be kept secret by one of the exemptions. . . .' [S.Rep. No. 813, 89th Cong., 1st Sess. 10 (1965).] The House committee's statement is almost the same. [H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1965).]

"The pull of the word 'specifically' is away from all else—away from implied meanings, away from reliance on legislative history, and away from needed judicial legislation in interpreting the Act. Courts that usually constitute themselves as working partners with legislative bodies to produce sensible and desirable legislation may follow their habits in *narrowing* the ascertainable meaning of the words of an exemption, but in some degree they are restricted in following those habits in *broadening* that meaning. The 'specifically stated' restriction operates in only one direction." (1. K. Davis, *supra*, §5:28, pp. 386-87; emphasis in original.)

Petitioners have a strong burden to shoulder here; they should demonstrate unequivocally that, in the circumstances of this case, the disputed documents clearly fall within Exemption 5 and that the court of appeals' "related litigation" standard does not best reconcile the policies underlying the FOIA and the work product rule. Respondent submits that they have simply failed to do so.

For the foregoing reasons, respondent respectfully submits that the judgment below should be affirmed.

Dated: February 8, 1983

Respectfully submitted,

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